

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

vs.

FXOPEN INVESTMENTS INC.,

Defendant.

Civil Action No. 1:11-cv-00565

Judge:

**COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF
AND PENALTIES UNDER THE COMMODITY EXCHANGE ACT**

Plaintiff, U.S. Commodity Futures Trading Commission (“Commission” or “CFTC”), by its attorneys, alleges as follows:

I. SUMMARY

1. On October 18, 2010, the CFTC enacted new regulations implementing certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010), §§701-774, 124 Stat. 1376 (enacted July 21, 2010), and the Food, Conservation and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008 (“CRA”)), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), to be codified at 7 U.S.C. §§ 1 *et seq.*, with respect to off-exchange foreign currency (“forex”) transactions. Pursuant to Section 2(c)(2)(C)(iii)(I)(aa) of the Commodity Exchange Act (the “Act”) as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa), an entity must be registered if it wants to solicit or accept orders from a non-eligible contract participant (“ECP”) in connection with forex transactions at a retail foreign exchange dealer (“RFED”) or futures commission merchant.

Pursuant to CFTC Regulation (“Regulation”) 5.3(a)(6)(i), to be codified at 17 C.F.R.

§ 5.3(a)(6)(i), in connection with forex transactions, all RFEDs must be registered with the CFTC as of October 18, 2010.

2. Beginning on October 18, 2010 and continuing to the present (the “relevant period”), FXOpen Investments Inc. (“FXOpen”), while acting as an RFED, solicited orders from non-ECPs in connection with forex transactions without registering as an RFED with the CFTC in violation of Section 2(c)(2)(C)(iii)(I)(aa) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(C)(iii)(I)(aa), and Regulation 5.3(a)(6)(i), to be codified at 17 C.F.R. § 5.3(a)(6)(i).

3. By virtue of this conduct and the conduct further described herein, FXOpen has engaged, is engaging, or is about to engage in acts and practices in violation of the Act, as amended by the CRA, and the Regulations.

4. Accordingly, pursuant to Section 6c of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 13a-1, and Section 2(c)(2) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2), the Commission brings this action to enjoin FXOpen’s unlawful acts and practices, to compel its compliance with the Act, as amended by the CRA, and the Regulations, and to further enjoin FXOpen from engaging in certain commodity or forex-related activity, including, through its website, soliciting customers or offering to be the counterparty to customers’ forex transactions without appropriate registration with the Commission.

5. In addition, the Commission seeks civil monetary penalties and remedial ancillary relief, including, but not limited to, trading and registration bans, disgorgement, rescission, pre- and post-judgment interest, and such other relief as the Court may deem necessary and appropriate.

6. Unless restrained and enjoined by this Court, FXOpen likely will continue to engage in the acts and practices alleged in this Complaint and similar acts and practices, as more fully described below.

II. JURISDICTION AND VENUE

7. The Commission has jurisdiction over the conduct and transactions at issue in this action pursuant to Section 6c of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 13a-1, and Section 2(c)(2) of the Act as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2).

8. This Court has jurisdiction over this action pursuant to Section 6c(a) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 13a-1(a), which provides that whenever it shall appear to the Commission that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order promulgated thereunder, the Commission may bring an action in the proper district court of the United States to enjoin such act or practice or to enforce compliance with the Act and any rule, regulation, or order promulgated thereunder, and said courts shall have jurisdiction to entertain such actions.

9. Venue properly lies with the Court pursuant to Section 6c(e) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 13a-1(e), because FXOpen transacts business in this District and certain transactions, acts, practices, and courses of business alleged in this Complaint occurred, are occurring, or are about to occur within this District.

III. PARTIES

10. Plaintiff **Commodity Futures Trading Commission** is an independent federal regulatory agency charged by Congress with the administration and enforcement of the Act, 7 U.S.C. §§ 1 *et seq.*, and the Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.*

11. Defendant **FXOpen Investments Inc.** is a company of undisclosed origin. According to its main website, www.fxopen.com, its headquarters is located at Ebene Heights No. 34, Cybercity Ebene, Mauritius, and its worldwide regional offices are located in Cairo, Egypt; Paris, France; Kuala Lumpur, Malaysia; Jakarta, Indonesia; Almaty, Kazakhstan; and Moscow, Russia. All of FXOpen's websites, including www.fxopen.com, are hosted on servers located in the following cities in the United States: (1) Dallas, Texas; (2) Seattle, Washington; and (3) Washington, D.C. The www.fxopen.com website publishes a United States telephone number (352-397-2678), which is based in Brooksville, Florida; a second United States telephone number "to open, close or modify a trade" for standard accounts (718-487-9974), which is based in Jamaica, New York; and a United States fax number (925-476-7795), which is based in Walnut Creek, California. FXOpen advertises that it was founded as an educational company in 2003 and became a forex broker in 2005. FXOpen has never been registered with the Commission in any capacity.

IV. STATUTORY BACKGROUND

12. For the purposes of trading forex, a "retail foreign exchange dealer" is defined in Regulation 5.1(h)(1), to be codified at 17 C.F.R. § 5.1(h)(1), as any person that is, or offers to be, the counterparty to a retail forex transaction, except for a person described in sub-paragraph (aa), (bb), (cc)(AA), (dd), (ee), or (ff) of Section 2(c)(2)(B)(i)(II) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(B)(i)(II). These exceptions pertain to certain United States

financial institutions, brokers and dealers registered under the Securities Exchange Act of 1934 and associated persons thereof, futures commission merchants and affiliated persons thereof, financial holding companies, and RFEDs registered with the Commission, and do not apply to FXOpen.

13. An ECP is defined by the Act, in relevant part, as an individual with total assets in excess of (i) \$10 million; or (ii) \$5 million and who enters the transaction “to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual.” *See* Section 1a of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 1a.

V. FACTS

14. On October 18, 2010, the Commission enacted new regulations implementing certain provisions of Dodd-Frank and the CRA. For the purposes of forex transactions, the new regulations, among other things, require RFEDs to register as RFEDs with the CFTC.

15. FXOpen describes itself on www.fxopen.com and other websites as a forex broker offering standard, micro, and other accounts, with more than \$65 billion in trading volume passing through its trading platforms every month.

16. In its standard and micro customer account agreements, FXOpen states that it “will engage in foreign exchange contracts transactions with Customer in accordance with Customer’s oral, written or electronic instructions. FXOpen will act as the counter-party to the Customer in all such transactions.”

17. Because FXOpen’s accounts are not limited to individuals with total assets of \$10 million, or individuals with total assets of \$5 million who enter forex transactions to manage

risks associated with an asset owned or liability incurred, FXOpen solicits individuals who are non-ECPs in connection with forex transactions.

18. FXOpen solicits potential customers to open leveraged forex trading accounts and trade forex globally, including in the United States and in this District, including through its main website, www.fxopen.com. This website is publicly accessible and is hosted on a server located in the United States. FXOpen also maintains 47 other websites,¹ all of which are also hosted on servers located in the United States (Dallas, Texas, Seattle, Washington, and Washington, D.C.). In addition, on the “Contact Us” page of the www.fxopen.com website, FXOpen makes available to potential customers a United States telephone number (352-397-2678), which is based in Brooksville, Florida; a second United States telephone number “to open, close or modify a trade” for standard accounts (718-487-9974), which is based in Jamaica, New York; and a United States fax number (925-476-7795), which is based in Walnut Creek, California, all of which further enable it to solicit and service customers in the United States.

19. Potential customers may apply to open an FXOpen forex trading account through the www.fxopen.com website by selecting the “Open a Live account!” link. After selecting the type of account to open, potential customers are prompted to fill out a personal information section, including address. “United States” is provided as an option under the “Country” drop-down menu in the address section.

20. Additionally, in the “Forum” section of its website, FXOpen representatives specifically solicit United States residents to open accounts with FXOpen, in part by advertising

¹ Approximately 37 of these websites redirect automatically to www.fxopen.com or are variations of the www.fxopen.com website, *i.e.*, www.fxopenforex.com or www.fxopengermany.net; all but one of these websites publish at least one phone number in the United States, and all but one of these websites automatically display in English or allow the user to display it in English using a language drop-down menu. FXOpen’s remaining websites no longer exist, are forums for Internet discussions, or relate to motorsports.

that potential customers in the United States can escape United States laws and regulations by opening accounts with FXOpen. For example, on October 5, 2010, in response to a question regarding whether FXOpen could accept applicants from the United States after October 18, 2010 following recent CFTC rulings, an FXOpen representative answered with a post, stating, “Since we don’t have an office in the US, nor are we an affiliate of a US based broker, we are not bound by CFTC rulings. Rest assured we will be able to accept US clients for the foreseeable future unless a legal impediment appears.” And in a February 14, 2010 post discussing proposed CFTC leverage regulations, an FXOpen representative stated, “We would like to assure you that FXOpen is not compliant to these laws, as we are not a US entity” and signed his posting, “Taki & the FXOpen team.” In a February 15, 2010 response to that post, another FXOpen representative stated: “Of course the new law got passed. They hid it inside an innocuous ‘farm’ bill. [D]ebate on it would have been minimal at best. Good news for FXOpen. We will welcome all of the new US clients into our company.”

21. On information and belief, the forex transactions FXOpen engages in neither result in delivery within two days nor create an enforceable obligation to deliver between a seller and a buyer who have the ability to deliver and accept delivery, respectively, in connection with their lines of business. Rather, these forex contracts remain open from day to day and ultimately are offset without anyone making or taking delivery of actual currency (or facing an obligation to do so).

22. Since October 18, 2010, FXOpen has solicited non-ECPs to trade forex and has acted as an RFED by offering to be the counterparty to retail forex transactions, but as of the date of filing this Complaint, FXOpen has not registered as an RFED with the CFTC.

23. Furthermore, FXOpen is not exempt from registration by virtue of meeting any of the descriptions in sub-paragraphs (aa), (bb), (cc)(AA), (dd), (ee), or (ff) of Section 2(c)(2)(B)(i)(II) of the Act, as amended by the CRA.

VI. VIOLATIONS OF THE COMMODITY EXCHANGE ACT

COUNT ONE

**VIOLATION OF SECTION 2(c)(2)(C)(iii)(I)(aa) OF THE ACT AS AMENDED BY THE
CRA:**

FAILURE TO REGISTER

24. Paragraphs 1 through 23 are realleged and incorporated herein.

25. During the relevant period, FXOpen solicited or accepted orders from non-ECPs in connection with forex transactions as an RFED. FXOpen engaged in this conduct without being registered as an RFED, as required by Regulation 5.3(a)(6)(i), to be codified at 17 C.F.R. § 5.3(a)(6)(i), all in violation of Section 2(c)(2)(c)(iii)(I)(aa) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(c)(iii)(I)(aa).

26. Each day since October 18, 2010 that FXOpen engaged in this conduct is alleged as a separate and distinct violation of Section 2(c)(2)(c)(iii)(I)(aa) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(c)(iii)(I)(aa).

COUNT TWO

**VIOLATION OF REGULATION 5.3(a)(6)(i):
FAILURE TO REGISTER AS A RETAIL FOREIGN EXCHANGE DEALER**

27. Paragraphs 1 through 23 are realleged and incorporated herein.

28. During the relevant period, FXOpen acted as an RFED, as defined in Regulation 5.1(h)(1), to be codified at 17 C.F.R. § 5.1(h)(1), yet failed to register as an RFED with the CFTC in violation of Regulation 5.3(a)(6)(i), to be codified at 17 C.F.R. § 5.3(a)(6)(i).

29. Each day since October 18, 2010 that FXOpen failed to register as an RFED with the CFTC is alleged as a separate and distinct violation of Regulation 5.3(a)(6)(i), to be codified at 17 C.F.R. § 5.3(a)(6)(i).

VII. RELIEF REQUESTED

WHEREFORE, the CFTC respectfully requests that this Court, as authorized by Section 6c of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 13a-1, and pursuant to its own equitable powers, enter:

- A. An order finding that FXOpen violated Section 2(c)(2)(c)(iii)(I)(aa) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(c)(iii)(I)(aa);
- B. An order finding that FXOpen violated Regulation 5.3(a)(6)(i), to be codified at 17 C.F.R. § 5.3(a)(6)(i);
- C. An order of permanent injunction prohibiting FXOpen, and any other person or entity associated with it, from engaging in conduct in violation of Section 2(c)(2)(c)(iii)(I)(aa) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 2(c)(2)(c)(iii)(I)(aa);
- D. An order of permanent injunction prohibiting FXOpen, and any other person or entity associated with it, from engaging in conduct in violation of Regulation 5.3(a)(6)(i), to be codified at 17 C.F.R. § 5.3(a)(6)(i);
- E. An order of permanent injunction prohibiting FXOpen, and any other person or entity associated with it or its websites, from operating its websites while in violation of Section 2(c)(2)(c)(iii)(I)(aa) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 2(c)(2)(c)(iii)(I)(aa), and Regulation 5.3(a)(6)(i), to be codified at 17 C.F.R. § 5.3(a)(6)(i);

- F. An order of permanent injunction prohibiting FXOpen, and any other person or entity associated with it, from directly or indirectly:
1. Trading on or subject to the rules of any registered entity (as that term is defined in Section 1a of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 1a;
 2. Entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2010)) (“commodity options”), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) (“forex contracts”), for its own personal account or for any account in which it has a direct or indirect interest;
 3. Having any commodity futures, options on commodity futures, commodity options, and/or forex contracts traded on its behalf;
 4. Controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, and/or forex contracts;
 5. Soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;

6. Applying for registration or claiming exemption from registration with the CFTC in any capacity, and engaging in any activity requiring such registration or exemption from registration with the CFTC except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2010); and
 7. Acting as a principal (as that term is defined in Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2010)), agent, or any other officer or employee of any person registered, exempted from registration, or required to be registered with the CFTC except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2010).
- G. Enter an order requiring FXOpen, as well as any successors thereof, to disgorge to any officer appointed or directed by the Court all benefits received, including, but not limited to, salaries, commissions, loans, fees, revenues, and trading profits derived, directly or indirectly, from acts or practices that constitute violations of the Act, as amended by the CRA, and the Regulations, including pre- and post-judgment interest;
- H. Enter an order directing FXOpen, as well as any successors thereof, to rescind, pursuant to such procedures as the Court may order, all contracts and agreements, whether implied or express, entered into between it and any of the investors whose funds were received by it as a result of the acts and practices which constituted violations of the Act, as amended by the CRA, and the Regulations as described herein;
- I. Enter an order requiring FXOpen to pay civil monetary penalties under the Act, to be assessed by the Court, in amounts of not more than the higher of: (1) triple the

monetary gain to FXOpen for each violation of the Act as amended by the CRA and the Regulations; or (2) \$140,000 for each violation committed on or after October 23, 2008;

- J. Enter an order requiring FXOpen to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2) (2006); and
- K. Enter an Order providing such other and further relief as this Court may deem necessary and appropriate under the circumstances.

Respectfully submitted,

Date: January 26, 2011

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